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Attorneys for Defendant
ALTA BATES SUMMIT MEDICAL CENTER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX, JR., M.D.,

Plaintiff,

v.

ALTA BATES SUMMIT MEDICAL CENTER,

Defendant.

CASE NO. C 07-2486 WHA

DEFENDANT ALTA BATES SUMMIT MEDICAL CENTER'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

FED. R. CIV. P. 56

DATE: April 3, 2008
TIME: 8:00 a.m.
DEPT: Ctrm. 9, 19th Floor
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on April 3, 2008 at 8:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 9 of the above-entitled Court, located at 450 Golden Gate Ave., 19th Floor, San Francisco, CA, Defendant Alta Bates Summit Medical Center (the "Medical Center" or "ABSMC") shall ask that the Court grant summary judgment in its favor and against Plaintiff Coyness L. Ennix, Jr., M.D. ("Ennix" or "Plaintiff") pursuant to Fed. R. Civ. P. 56.

ABSMC's motion shall be based upon this Notice of Motion and Motion for Summary Judgment, the accompanying Memorandum Of Points And Authorities in support thereof, the excerpts of relevant deposition testimony, the Declarations of Alex Hernaez, Robert H. Breyer, M.D., Dr. Jeffrey Breall, M.D., William M. Isenberg (previously filed under seal on May 30, 2007), Karen Weaver (previously filed under seal on May 30, 2007), Lamont D. Paxton (previously filed under seal on May 30, 2007), Coyness L. Ennix (previously filed on July 19, 2007), as well as all records and proceedings in this action, and on such other and further matters as may be presented to the Court in connection with the hearing.

Pursuant to 42 U.S.C. § 1988, ABSMC requests that it be awarded attorneys' fees as a prevailing party.

DATED: February 20, 2008

Respectfully submitted,

KAUFF MCCLAIN & MCGUIRE LLP

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

"Hospital peer review, in the words of the [California] Legislature, is essential to preserving the highest standards of medical practice throughout California." *Kibler v. Northern Inyo County Local Hosp. Dist.*, 39 Cal. 4th 192, 199 (2006) (internal quotations omitted). Indeed, both the Supreme Court of the United States and the Ninth Circuit Court of Appeals have acknowledged a medical staff's "unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 (1984); *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1155 (9th Cir. 2001). Because of this, "the decision of a hospital's governing body concerning the granting of hospital privileges is to be accorded great deference." *Id. (citing Laje v. R.E. Thomason Gen. Hosp.*, 564 F.2d 1159, 1162 (5th Cir. 1977)). And because of this deference, the assessment of a particular physician's capabilities "is not one which [courts] are inclined to impugn." *Baqir v. Principi*, 434 F.3d 733, 742 (4th Cir. 2006).

As this Court has already held, Ennix, like all other staff physicians, must adhere to the Summit Medical Staff's internal peer review procedures, which provide both medical expertise and oversight. Indeed, the internal procedures here are fundamentally fair and include the right to a hearing, the right to present evidence, and the right to appeal. Ennix has unilaterally abandoned this process and, at bottom, asks this Court to second guess the combined medical judgment of dozens of unbiased professionals. It should decline the invitation. As discussed more fully below, there simply is no evidence of racial animus by the Summit Medical Staff Medical Executive Committee ("MEC"),[1] which is the **only** question before the Court.

In particular, Ennix has admitted possessing no evidence that any of the decision makers held any racial animus. And it is undisputed that the core report, that of

[1] The members of the February 8, 2005 MEC are listed in Exhibit A to the previously filed Declaration of Karen Weaver.

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the outside review agency, National Medical Audit ("NMA"), was prepared by physicians who did not know Ennix's race. Moreover, Ennix's central claim—that he has somehow been "cleared" by all neutral reviewers—is patently false. Rather, his actions have been questioned by the Medical Board of California, by Dr. Hon S. Lee, a physician that Ennix concedes is a "top practitioner," and by **two** of Ennix's own retained experts.

As to arguments that other cardiac surgeons should have been treated more harshly, those surgeons simply were not similarly situated. Specifically, it is undisputed that none of those surgeons' procedures came to the attention of the MEC in a manner akin to what occurred with Dr. Ennix. Ennix started this case having a vague notion that others had been treated differently. Now, after months of discovery, covering 15 years of peer review, and exhaustive depositions, he still has nothing to rely upon but speculation and conjecture. Therefore summary judgment is proper.

Additionally, Ennix's claim fails for a more fundamental reason: there is no contract between him and ABSMC. And absent a contractual relationship, a claim under § 1981 cannot be asserted.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On May 9, 2007, Plaintiff commenced an action in this Court styled *Coyness L. Ennix, Jr., M.D., as an individual and in his representative capacity under Business & Professions Code § 17200 et seq. v. Russell D. Stanten, M.D., Leigh I.G. Iverson, M.D., William M. Isenberg, M.D., Ph.D., Alta Bates Summit Medical Center and Does 1 through 100.* The Complaint asserts five causes of action—one arising under federal law and the balance under California law. By Order dated August 28, 2007,[2] the Court dismissed the state-law causes of action as well as the individual defendants. Accordingly, there is but a single claim remaining against ABSMC. Specifically, Count I of the Complaint alleges race discrimination in violation of 42 U.S.C. § 1981 based upon

[2] The Court's August 28, 2007 Order details the peer review process that Ennix is attempting to challenge.

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unspecified "contractual duties" Plaintiff alleges he had "with Alta Bates Summit and his patients." *See Complaint*, ¶ 41 at p. 12:13.

Ennix has been on staff at Alta Bates or Summit Medical Center (or their predecessors) since 1981—nearly thirty years. *See* Complaint at ¶ 17. At one time, Ennix was a member of the East Bay Cardiac Surgery Center. In October of 2005, however, Ennix left the group. *See* Complaint at ¶ 30. Nonetheless, Ennix remains on the Summit medical staff. Ennix Tr. at 49:13-20. The East Bay Cardiac Surgery Center held certain contracts with ABSMC. *See, e.g.,* Hernaez Decl. at ¶ 2 & Ex. A. By contrast, Defendant contends that Ennix cannot identify any individual contracts between the parties and, as he expressly concedes, Ennix has never been employed by ABSMC. *See* Ennix Tr. at 50:3-8 (attached as Exhibit B to the Hernaez Decl.).

The MEC made the peer review decisions at issue in this lawsuit. Those decisions were based upon the work of multiple peer review sub-committees, cardiac surgeon Dr. Lee, and the independent outside peer review organization NMA, which is a unit of The Mercer Human Resource Consulting Group. *See* Isenberg Decl. at ¶ 1.

Dr. Neil Smithline, NMA's Director of Clinical Quality, appointed two reviewers, Leland B. Housman, M.D., F.A.C.S., F.A.C.C., a cardiothoracic surgeon, and Robert H. Breyer, M.D., a cardiovascular surgeon. *See* Isenberg Decl. at ¶ 11. Also participating in the NMA review was Dr. Jeffrey Breall, M.D., who is a Board certified physician in internal medicine, cardiovascular diseases and interventional cardiology. *See* Breall Decl. at ¶ 1, lines 6-7.

Ennix spoke with these reviewers by telephone and provided them with "lots of information." Ennix Tr. at 297:12-17. In fact, Dr. Ennix was given the opportunity to present written information, his perspectives on each case, and responses to questions from the NMA reviewers prior to the preparation of NMA's written report. *See* Isenberg Decl. at ¶ 11.[3] Importantly, none of the NMA physician-reviewers knew Ennix's

[3] The NMA report is attached as Appendix A to the AHC report submitted with Dr. Paxton's previously filed declaration.

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race until after the report was finalized. *See* Breyer Decl. at ¶ 3; *see also* Breall Decl. at ¶ 3 (same); Smithline Tr. at 320:21-23 (not aware of Dr. Ennix's race at any time prior to the date of the NMA report); Housman Tr. at 131:15 to 132:5.[4]

Indicative of the care applied by the MEC to this peer review process is the fact that fees for this outside audit were about $115,000, a number which includes charges for over 170 hours of time spent by the three physician reviewers on chart review, data analysis, consideration of material submitted by Dr. Ennix, speaking with Dr. Ennix, and preparation of the NMA report. *See* Isenberg Decl. at ¶ 11.

In the May 3, 2005 NMA report, three major problems with Plaintiff's standard of care were identified: (1) poor judgment (leading to death in three cases, post-operative cardiac arrest in one case, and severe complications in another case);[5] (2) substandard surgical technique (six of ten cases); and (3) "grossly substandard" documentation.[6] *See* Paxton Decl., ¶ 5 & Ex. A (Appendix A at pp. 4-31); Isenberg Decl., ¶ 12. The NMA report concluded that "[i]f [Plaintiff's] patterns of care go uncorrected, it is likely that there will be future patient harm." *Id.*

Ultimately, Plaintiff's peer review involved input from more than 35 different physicians and stemmed from, among other things, Plaintiff's "poor results" with certain surgical procedures (including death, respiratory failure or a return to surgery) as well as statistical data showing that Plaintiff had a patient mortality rate more than double that of his peers over a four year time period. *See* Isenberg Decl. at ¶¶ 7-9. Based upon this and other similarly alarming patient care information, the MEC took corrective actions

---

[4] The relevant deposition testimony of Dr. Smithline is attached as Exhibit C to the Hernaez Decl. and the relevant testimony of Dr. Housman is attached as Exhibit D.

[5] NMA concluded that Plaintiff exercised poor judgment in deciding whether to operate, when to operate, the best treatment option for the patient, and when additional information should have been obtained before making the treatment decision. The cases reviewed showed that Plaintiff frequently failed to integrate his patients' changing clinical situation into his decision making. Paxton Decl., Ex. A (Appendix A at pp. 4-18, 30).

[6] NMA concluded that Plaintiff's operative notes were "grossly substandard." Paxton Decl., Ex. A (Appendix A at p. 31). The notes reviewed did not provide sufficient detail of operative findings or describe what actually happened in the operating room. Rather, his notes convey the impression that surgery was routine, when in fact, there were multiple complications and very prolonged surgery times. Paxton Decl., Ex. A (Appendix A at p. 31).

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including an agreed upon restriction to surgical assisting from May to October of 2005 and proctoring from October of 2005 to July of 2006. *See* Isenberg Decl. at ¶¶ 6-17 (outlining each peer review decision made).

III. ARGUMENT.

A. Standard Of Proof Under Fed. R. Civ. P. 56.

On its motion for summary judgment, ABSMC bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). It need not disprove Ennix's case, however. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 325 (1986). If ABSMC meets its initial burden, then Ennix "may not rely merely on allegations or denials in [his] own pleading; rather, [Ennix's] response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If [he] does not so respond, summary judgment should, if appropriate, be entered against that party." *See* Fed. R. Civ. P. 56(e).

Moreover, Ennix "must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for [Ennix], there is no 'genuine issue for trial.'" *See Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *See Celotex*, 477 U.S. at 327. "[T]he mere existence of a scintilla of evidence" is insufficient to create a genuine issue of material fact. *See Anderson*, 477 U.S. at 252.

B. The § 1981 Claim Fails Because There Is No "Contract" At Issue.

Plaintiff's first cause of action fails because there is no contractual relationship between Plaintiff individually and ABSMC. In sworn Interrogatory responses, Ennix points to three types of "contracts," none of which are remotely sufficient to support a § 1981 claim.

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First, Ennix relies on contracts between ABSMC and the East Bay Cardiac Surgery Center. *See, e.g.,* Hernaez Decl. at ¶ 2 & Ex. A. However, these contracts fail under *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 480 (2006). In *Domino's Pizza*, the plaintiff (McDonald) was the "sole shareholder and president of JWM, Investments, Inc." *Id.* at 472. JWM and Domino's Pizza (rather than McDonald and Domino's Pizza) entered into several contracts. *Id.* Analyzing McDonald's right to bring a § 1981 claim individually, the Supreme Court ruled that a plaintiff "who lacks any rights under an existing contractual relationship with the defendant, and who has not been prevented from entering into such a contractual relationship" may not file suit under Section 1981. *Id.* at 472.

The Supreme Court emphasized that this long-standing rule is required by the text of the statute:

> *Section 1981* offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as plaintiff has or would have rights under the existing or proposed contractual relationship.

Id. at 476. Because no contractual relationship existed between the plaintiff and the defendant, the Court dismissed the claim. *Id.* at 474, 480. The same rule controls here. Because East Bay Cardiac Surgery Center (or any other entity) is not a party to this lawsuit, its rights cannot be enforced by Ennix individually. Indeed, having the benefit of using a corporation to enter into these independent contractor agreements, Ennix cannot now use the agreements as a basis for claiming purely individual benefits.

Second, Ennix points to various consent forms signed by Ennix's patients. *See, e.g.,* Hernaez Decl. at ¶ 6 & Ex. E. These simply are not contracts between Ennix and ABSMC. Rather, they provide patients with information regarding medical procedures. The consents do not obligate ABSMC to do anything, they do not show ABSMC to be a party, they do not show any acceptance by ABSMC, and they do not

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guarantee any consideration to ABSMC. Moreover, the Court in *Darke v. Estate of Isner*, 20 Mass. L. Rep. 419, *22 (Mass. Super. Ct. 2005), held that physician consent forms do not create a contract between physician and patient. Surely then there can be no contract created between hospital and physician by a consent form.

Third, Ennix points to the Medical Staff Bylaws as contractual. *See* Isenberg Decl. at Exs. A-C. However, in *O'Byrne v. Santa Monica-UCLA Medical Ctr.*, 94 Cal. App. 4th 797, 810 (2001) the Court held that "under California contract law, medical staff bylaws adopted pursuant to California Code of Regulations, title 22, section 70703, subdivision (b), do not in and of themselves constitute a contract between a hospital and a physician on its medical staff."[7] True, the Court in *Janda v. Madera Community Hosp.*, 16 F. Supp. 2d 1181, 1185 (E. D. Cal. 1998) reached a somewhat inconsistent (but different) conclusion. However, it did so without the benefit of *O'Byrne*, a California Court of Appeals case establishing a point of California contract law. Indeed, the *Janda* Court recognized its limitations absent any decisions from the state's highest court or any intermediate appellate court. *Id.* at 1186. This Court, unlike the Court in *Janda*, has the benefit of *O'Byrne*. And, where the state Supreme Court has not addressed the question, the "federal court must follow the decisions of the state's intermediate appellate courts." *Id.*

In addition, "*Janda* itself suggested its conclusion would have been different had it been the medical staff bylaws at issue [as they are here] rather than the hospital's governing body's bylaws." *O'Byrne*, 94 Cal. App. 4th at 808; *see also Janda*, 16 F. Supp. 2d at 1187, which emphasized that 22 Cal. Code Reg. § 70703 requires physicians to comply with medical staff bylaws and not hospital corporate bylaws. In *Janda*, it was this additional agreement which transcended the physician's regulatory obligations and constituted the consideration necessary for the creation of a contract. The issue here is whether the Medical Staff's Bylaws, and not ABSMC's bylaws, created

[7] 22 Cal. Code Reg. § 70703 provides that a hospital's medical staff shall adopt bylaws establishing formal procedures for, among other things, evaluating staff members. The Bylaws at issue carry out this mandate. *See* Isenberg Decl., Exhs. A-C.

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a contract between Plaintiff and ABSMC. Therefore, under both *O'Byrne* and *Janda,* the Court should decline to find that a contractual relationship existed between Plaintiff and ABSMC.

Finally, unlike the litigants in *Janda* (where a contract of employment existed), there is no employment relationship here. "Staff physicians are private doctors granted medical staff privileges to treat their patients in the hospital setting." *Arnett v. Dal Cielo*, 14 Cal. 4th 4, 12 (1996). Indeed, Ennix does not even allege any contractual employment relationship. Rather, he has unequivocally renounced any such relationship:

> Q. You're certainly not an employee of the medical center; are you?
>
> A. No. That's for sure.
>
> Q. Have you ever been an employee of the medical center?
>
> A. No.

Ennix Tr. at 50:3-8.

And the very contracts he points to, between ABSMC and East Bay Cardiac Surgery Center, disavow any such status:

> **INDEPENDENT CONTRACTOR RELATIONSHIP**
>
> In performing the services described in this Agreement, Group (and each Physician and Employee) is acting as an independent contractor, and shall not be considered an employee, joint venturer, or partner of Hospital for any purpose whatsoever."

See Hernaez Decl. at ¶ 2 & Ex. A (p. 9, Section 5).

Nor can Ennix possibly claim to be a third-party beneficiary of the contracts between ABSMC and East Bay Cardiac Surgery Center:

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> [T]his Agreement shall not be construed as creating any right, claim or cause of action against either party by any person or entity not a party to this Agreement.

Id. at Ex. A (p. 12, Section 11.5). Because Ennix is not defined as a party to the contracts (*id.* at p. 1, above RECITALS), he cannot claim any third-party rights against ABSMC under the contracts. And because he has no contractual agreements with ABSMC whatsoever, he simply cannot use § 1981 to excuse his failure to exhaust the administrative remedies provided him by ABSMC.

C. Ennix's § 1981 Claim Cannot Pass Muster Under *McDonnell Douglas Corp. v. Green.*

In evaluating disparate treatment claims under § 1981, Courts apply the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004). The applicable test under *McDonnell Douglas* is as follows:

> A plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for a discriminatory motive.

Green, 411 U.S. at 802-05. The bottom line in § 1981 cases is straightforward: "proof of intent to discriminate is **necessary** to establish a violation." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1438 (9th Cir. 1984) (emphasis added). Here, Ennix's claim fails because he cannot establish a *prima facie* case and because he has no evidence whatsoever of pretext, much less actual race based discrimination.

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1. Ennix Cannot Establish A Prima Facie Case Of Race Discrimination.

In order to establish his *prima facie* case, Ennix must offer evidence that "gives rise to an inference of unlawful discrimination." *See Yartzoff v. Thomas*, 809 F. 2d 1371, 1374 (9th Cir. 1987). If he fails to show "specific facts" that establish a *prima facie* case, summary judgment is appropriate. *Id.* at 1374; *see also Palmer v. United States*, 794 F.2d 534, 536-39 (9th Cir. 1986). To begin with, at deposition Ennix conceded that he has no direct evidence of discriminatory intent by any of the now-dismissed individual defendants:

> Q. Is it correct, then, that none of the defendants ever said anything to you which was disparaging of your race?
>
> A. Of course not. I just told you that these are highly intelligent people. Of course not.

Ennix Tr. at 106:6-10.

Ennix further conceded that he has no evidence as to whether any of the non-defendant members of the February 8, 2005 MEC "had a racial bone in his [or her] body," which was defined to mean having "any racial animus against African Americans." *See* Ennix Tr. at 339:12-25. Specifically, when asked whether any non-defendant member of the February 8, 2005 MEC harbored any racial animus against African Americans, Ennix answered either "no," "probably not" or "I don't know" as to each member. *See* Ennix Tr. at 325:12-327:18.

And, as to the members of the February 8, 2005 MEC who are also defendants (i.e., William Isenberg, Leigh Iverson and Steven Stanten), Ennix made equally important concessions:

> Q. Aside from the fact that Dr. Isenberg participated in the peer review process that you globally believed to have been discriminatory, do you have any basis for believing that Dr. Isenberg has a racial bone in his body?
>
> A. I don't know.

See Ennix Tr. at 328:1-6.

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Q. Aside from the facts that you believe Dr. Iverson participated in a peer review process which you globally believe to have had aspects of racial discrimination, do you have any factual evidence that Dr. Iverson has a racial bone in his body?

A. Tough to say.

Q. That's your answer?

A. That's my answer.

See Ennix Tr. at 328:16-24.

Q. Aside from participating in a peer review process which you globally believe had some aspects of racial discrimination, do you have any factual basis for saying that Dr. Steve Stanten has a racial bone in his body?

A. I suspect that he has.

Q. Give me one factual basis for that suspicion?

A. I can't give you any.

See Ennix Tr. at 329:17-25.

Ennix's mere belief that discrimination occurred, without specific supporting facts, is wildly insufficient to avoid summary judgment. And this rule has been unequivocally stated by the Ninth Circuit:

> A plaintiff's belief that a defendant acted from an unlawful motive, without evidence supporting that belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive. To be cognizable on summary judgment, evidence **must** be competent.

Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028 (9th Cir. 2001) (emphasis added); *see also Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994) ("Mere conclusory assertions of discriminatory intent, embodied in affidavits or deposition testimony, cannot be sufficient to avert summary judgment."); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) ("When the nonmoving party relies only

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on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.").

Based upon the foregoing, the Court should find that Ennix has not established a *prima facie* case of discrimination.

2. Assuming *Arguendo* Ennix Could Establish A *Prima Facie* Case Under § 1981 (And Surely He Cannot) ABSMC Has More Than Ample Evidence To Rebut It.

To rebut Ennix's *prima facie* case, ABSMC "must merely articulate a legitimate, nondiscriminatory reason for the action." *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917-18 (9th Cir. 1996). "Once the employer meets this burden, the presumption of discrimination drops away." *Id.* As reviewed in the Statement section of the Court's August 28, 2007 Order, Ennix challenges the MEC's judgment in affirming the various practice restrictions imposed in 2005. However, as detailed above, there is not a scintilla of evidence that anyone operated from other than a good-faith business-related motivation. Indeed, the NMA report itself establishes the legitimate and nondiscriminatory motive for Ennix's peer review—a concern for patient safety. *See* Paxton Decl., ¶ 5 & Ex. A (Appendix A at pp. 4-31); Isenberg Decl., ¶ 12. As Dr. Isenberg explained:

> My actions concerning Dr. Ennix's peer review were at all times undertaken for the exclusive purpose of fulfilling the Medical Staff's responsibility for the quality of patient care provided at the Medical Center. At no time did I act with any racially discriminatory or other non-peer review related motivation. I never observed anyone in the process acting for reasons other than fostering the quality of patient care. In each instance, my actions were taken in consultation with other Medical Staff officers, and were approved by the MEC.

Isenberg Decl. at ¶ 8.

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3. ABSMC Is Entitled To Summary Judgment Because Ennix Has No Evidence Whatsoever Of Pretext, Much Less Any Evidence Of Race Discrimination.

The final step of the *McDonnell Douglas* test requires Ennix to show "pretext." However, a "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). As discussed above, Ennix has no evidence of discrimination, either direct or indirect. Nor can he possibly show that ABSMC's reasons for conducting peer review are somehow false. Indeed, at the end of the day all Ennix can possibly hope to do is find some doctors who may disagree with the MEC's conclusions. This type of "dispute" is simply not one of a material fact. Indeed, what Ennix really asks this Court to do is re-litigate the results of ABSMC's peer review process. But, if Ennix was unhappy with that process, then—as this Court has already held—he should have exhausted his administrative remedies under *Westlake Comm. Hosp. v. Los Angeles Superior Ct.*, 17 Cal. 3d 465, 483-84 (1976). His failure to do so cannot now support a § 1981 claim.

a. Ennix Cannot Be Compared to Other "Similarly Situated" Physicians, Even If Such A Comparison Were Relevant.

One contention made by Ennix is that he was "subjected to far harsher treatment than similarly situated white physicians." Compl., ¶ 34. However, the Ninth Circuit has thrown significant doubt on whether such comparisons are even relevant in the peer review context:

> Dr. Smith's only challenge to Good Samaritan's investigation is that he was not permitted to discover or introduce evidence regarding the conduct of other doctors. Dr. Smith essentially claims he was not the worst doctor at Good Samaritan. However, nothing in the statute, legislative history, or case law suggests the competency of other doctors is relevant in evaluating whether Good Samaritan conducted a reasonable

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investigation into Dr. Smith's conduct.

Smith v. Ricks, 31 F.3d 1478, 1486 (9th Cir. 1994) (applying the Health Care Quality Improvement Act).

And, assuming such evidence is somehow relevant, to make any comparison Ennix must show that another physician is "directly comparable" to him "in all material respects" and that such individual was treated more favorably than him. *See Mbadiwe v. Union Mem'l Reg'l Med. Ctr., Inc.*, 2007 U.S. Dist. LEXIS 30319, *5-*6 (W.D.N.C. Apr. 24, 2007) (applying the "similarly situated" standard to the Section 1981 claim of a minority physician who complained that his hospital privileges were restricted due to his race); *see also Vesom v. Atchison Hosp. Ass'n*, 2006 U.S. Dist. LEXIS 68576, *70-*71 (D. Kan. 2006) (same within the context of an application for reappointment and renewal privileges); *see also Mehta v. HCA Health Servs. of Fla., Inc.*, 2006 U.S. Dist. LEXIS 79536, *19 (M.D. Fla. 2006) (same concerning the termination of staff privileges).

In each of these cases, the defendant was granted summary judgment on a § 1981 claim because, in part, the Plaintiffs could not establish that they were similarly situated to other physicians within the highly complex and fact-specific context of peer review. *See Mbadiwe*, 2007 U.S. Dist. LEXIS 30319, *8 (W.D.N.C. Apr. 24, 2007) (granting summary judgment to the hospital where physician plaintiff failed to establish the existence of a similarly situated comparator); *Vesom*, 2006 U.S. Dist. LEXIS 68576 at *70-*71 (granting summary judgment to hospital following an extensive analysis of "similarly situated" evidence in which the Court noted that the MEC's stated reason for corrective action was significant to its analysis); and *Mehta*, 2006 U.S. Dist. LEXIS 79536, *19 (M.D. Fla. 2006) (granting summary judgment following a determination that a radiologist whose staff privileges were automatically terminated was not similarly situated to a Caucasian physician whose anesthesiology privileges were automatically terminated but whose pain management privileges were retained).

As demonstrated by these three cases, the "similarly situated" analysis is very difficult to apply in a peer review context because of the large number of relevant

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variables. Under *Mbadiwe*, for example, the Court will consider the specific problems associated with Plaintiff's provision of patient care when it determines whether any other physicians were similarly situated to Plaintiff. Applied here, that inquiry must include Ennix's acknowledged deficiencies while performing MIV Procedures (e.g., excessive time in surgery, large blood usage, and poor outcomes),[8] the performance concerns expressed by his own experts, Dr. Lee and the Medical Board of California, as well as Plaintiff's elevated mortality rate relative to other cardiac surgeons at the Summit Campus. *See* Isenberg Decl. at ¶ 8-9. Taken together, these fact-specific and egregiously serious factors distinguish Plaintiff's peer review from that of any other physician.

Moreover, Ennix was reviewed by the MEC from the outset. *See* Isenberg Decl. at ¶ 9. Accordingly, the only proper possible comparators are those individuals who have been reviewed at the MEC level. Without conceding that any such individuals are appropriate comparators, ABSMC produced a chart describing each situation. *See* Hernaez Decl. at ¶ 7 & Ex. F. Upon review, the chart shows that doctors of all races have been subject to MEC peer review. Moreover, the chart shows that Caucasian doctors are more than **three times** more likely than African-American physicians to be subjected to MEC peer review (i.e., 10 Caucasians have been subject to MEC review compared with only 3 African-Americans). And it shows that the types of restrictions placed on Ennix are similar to the types of restrictions placed on doctors of all other races.

These findings significantly undercut Ennix's race claim. For example, Physician O, a Caucasian cardiologist, was investigated by the MEC between 1992 and 1994 for a number of issues including clinical judgment errors and an overly aggressive treatment protocol which resulted in patient deaths. *See* Hernaez Decl. at ¶ 7 & Ex. F (p. 10). The corrective actions imposed by the MEC included the summary suspension of certain privileges for more than 1 year, the requirement that Physician O complete a

[8] See Isenberg Decl. at ¶ 9; Paxton Decl. at ¶ 8 & Ex. A.

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remedial education program, as well as 100% monitoring and proctoring of Physician O's clinical practice. Following an external peer review, Physician O resigned from the Summit Medical Staff.

Similarly, Physician F, a Caucasian Anesthesiologist, was peer reviewed by the MEC in 2003 on issues concerning Physician F's ability to provide safe patient care and the falsification of medical records. *See* Hernaez Decl. at ¶ 7 & Ex. F (p. 5). The corrective actions imposed included a summary suspension as well as a 100% prospective review of Physician F's cases and 100% monitoring and proctoring of all aspects of Physician F's practice. Although no external review was performed, Physician F ultimately resigned from the Summit Medical Staff. Ennix, who remains an active member of the Summit Medical Staff, received similar, and ultimately more forgiving, corrective actions throughout his peer review.

b. Ennix Cannot Show Any Racial Bias On The Part Of NMA.

Another issue repeatedly raised by Ennix is that NMA was some type of "sham" outfit. *See Complaint* at ¶ 24. This allegation is demonstrably false. NMA has reviewed thousands of records for hundreds of external peer review engagements since 2001, including many cardiac surgery cases. See Smithline Tr. at p. 36. Moreover, the Harvard School of Public Health helped the NMA to develop its external peer review methodology for cardiology and cardiac cases. See Smithline Tr. at 43. And Dr. Smithline testified that the NMA finds no substantial problem in the overall practice of the physicians being reviewed 20-30% of the time. See Smithline Tr. at 65. Ennix simply has no factual basis for impugning the reputation of NMA.

More importantly, what Ennix cannot show is that the decision to use NMA was racially motivated. As discussed above, Ennix concedes a lack of any such evidence against the former individual defendants and/or the MEC. And, because they did not know even know his race, Ennix cannot prove that the physician reviewers at NMA harbored racial animus. For example, Robert H. Breyer, M.D. testified as follows:

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> At no time during my review of the medical records of Coyness L. Ennix, Jr., M.D., was I aware of Dr. Ennix's race. In fact, I was not informed of Dr. Ennix's race until January 31, 2008 when I learned that Dr. Ennix had filed this lawsuit. Throughout my involvement in the focused review of Dr. Ennix's medical records, I saw no evidence of a "sham peer review" being conducted by either NMA, Mercer, or the Alta Bates Summit Medical Center. Nor did I see any evidence of racial discrimination against Dr. Ennix by any individual or entity.

See Breyer Decl. at ¶ 3; *see also* Breall Decl. at ¶ 3 (same); Smithline Tr. at 320:21-23 (not aware of Dr. Ennix's race at any time prior to the date of the NMA report); Housman Tr. at 131:15 to 132:5 (did not know Dr. Ennix's race at the time he conducted the medical records review for NMA/Mercer; he only learned of Dr. Ennix's race "very recently" when he learned that he had filed this lawsuit).

In fact, Dr. Housman, did not know anything about the Hospital's findings regarding Ennix until recently:

> Q: So I'm clear, your testimony is at no time before last week when you received this May 5th, 2005 document, the Alta Bates Summit Medical Center Focus Review, May 3rd, 2005, at no point prior to your review of that last week did you know that the hospital had identified problems in these five cases?
>
> [*Objections by ABSMC*]
>
> A: That's correct.
>
> Q: At any point before Monday morning, which was January 21st, 2008, did Neal Smithline communicate with you in any way that the hospital had concerns about the five cases you were reviewing?
>
> [*Objections by ABSMC*]
>
> A: Could you read that back.
>
> [*Objections by ABSMC*]

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A: Yeah. I don't believe so.

Q: What about anybody else at Mercer? The same question: Did anybody at Mercer communicate with you that the hospital had concerns about these five cases?

A: No, sir, and that's the nice thing about Mercer. We work in a vacuum. We don't know who sends the charts, who asks for them, why they ask for them. It's literally they arrive in a box. And also in that box is the electronic form, you know, to answer, and you answer it online. I think early on we had to return the form; now we can do it online. And so I had no idea that anyone else had reviewed it.

Housman Tr. at 30:22-32:8.

Hence, because no one who participated in the production of the NMA report knew of Ennix's race, the report's contents could not have been racially motivated. As the Ninth Circuit has held:

> [U]nder section 1981, a plaintiff must prove intentional discrimination to make out a discrimination claim using a disparate treatment theory. An employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race.

Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1987); *see also Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (discrimination claims cannot survive summary judgment if employee cannot show that the decision-makers were aware of his race).

c. Despite His Statements to the Contrary, Ennix Has Not Been Cleared by All "Neutral" Reviewers.

As supposed evidence of pretext, Ennix argues that he has been "cleared" by all neutral evaluators. For example, in his prior submissions to this Court, Ennix says that "Dr. Lee, cardiac surgeon, cleared the four minimally invasive cases of any quality-of-care issues." *See* Plaintiff's Opposition to Motion to Dismiss at 4:5-6 (filed July 12,2007). And the Complaint boasts "[t]hroughout this tortuous peer review process, all

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evaluations of Dr. Ennix's performance provided by qualified, disinterested experts found no deviation from the standard of care and no justification for the restrictions placed on Dr. Ennix's privileges." *See* Compl., at ¶ 3. But as discussed in detail below, Ennix's claims are demonstrably false. To the contrary, the Medical Board of California, Dr. Lee, and **two** of Ennix's own experts all found deviations from the standard of care.

For example, Ennix retained Bruce Reitz, M.D. to serve as an expert in this matter. Yet, until it was reviewed by Ennix's attorney in the peer review process (John Echevers) and subsequently revised by Dr. Reitz (often at the specific direction of Mr. Etchevers), the doctor's draft report contained substantial criticisms of Ennix's surgical skills. For example:

> **(A)** Although subsequently removed from the attorney-reviewed report, Reitz testified that he initially "drafted a paragraph saying that [his] review of the minimally invasive cases created in [his] mind concerns about the lack of training on the part of Dr. Ennix, perhaps, and on the part of the teams that were engaging in the surgery."

Reitz Tr. at 36:23-37:3.

> And, although he removed this concern from his final report, Dr. Reitz nonetheless concedes "that concerns about training of the OR team and Dr. Ennix's own training still stand."

Reitz Tr. at 41:3-7.[9]

> **(B)** The draft report says: "I do have concerns about the length of time of this operation [Case No. 1], which is excessive." This concern was removed from the report reviewed by Mr. Etchevers.

Reitz Tr. at 51:9-20.

[9] For purposes of comparison the draft report is Exhibit 4 to the Reitz deposition transcript and the final report is Exhibit 5.

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But, the deletion notwithstanding, Dr. Reitz still believes that "Case Number 1 was longer than he would consider to be standard."

Reitz Tr. at 72:17-20; see also Reitz Tr. at 82:13-21.

(C) For reasons he cannot recall, Dr. Reitz omitted from his final report the observation that "[t]he operation report is scanty at best and does not go into the details of why the procedure took so much time."

Reitz Tr. at 53:15-54:11.

Nonetheless, at deposition Dr. Reitz conceded that he still had the same "scanty at best" concerns expressed in the draft report.

Reitz Tr. at 62:16-63:25.

(D) In evaluating Case No. 3, Dr. Reitz wrote "[t]he operative report should have had more data to explain the length of the procedure and the intra-operative management." And, although that sentence was a "true sentence when [he] wrote it," Dr. Reitz cannot explain its absence from the final report.

Reitz Tr. at 90:16-91:2.

(E) In evaluating Case No. 4 Dr. Reitz initially wrote "The 3.5 hours needed to place a coronary sinus cannula which is documented in the anesthesia record is very excessive. The fact that this took as long as it did should have raised some concern in Dr. Ennix that perhaps this was not the right operation to perform in this patient." These sentences were removed by Mr. Etchevers and he simply re-wrote the paragraph.

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Reitz Tr. at 94:6-95:20.

And these are not the only substantive changes. For example, the final report includes some praise of Ennix for ultimately recognizing one of his errors. Reitz Tr. at 68:8-17. When asked "[w]ho suggested that you add that sentence," Dr. Reitz responded "Probably Mr. Etchevers." However, the factual basis for the praise was not something Dr. Reitz knew of his personal knowledge. Reitz Tr. at 68:25-69:10. Similarly, with respect to one of the evaluations relied upon by the MEC, Ennix's attorney changed Dr. Reitz's criticism from "could certainly be improved" to "substandard" and "definitely specious." Reitz Tr. at 73:14-25. Lastly, one change went so far as to reverse Dr. Reitz' opinion:

> Q. Turning to Case Number 2, please. You say, in your August 30, 2005 dictated report, in the last paragraph, "The extreme length of this operation is a concern, as is the blood product usage." Does that language appear in the final report?
>
> A. No.
>
> Q. In fact, the final report attempts to defend the prolonged surgery time, correct?
>
> A. Yes.

Reitz Tr. at 76:23-77:21.

Nor is Dr. Reitz alone in his concerns regarding Ennix. Another expert **retained by Ennix**, Dr. J. Donald Hill, specifically found that in at least one case "the medical standard of care for the community was breached." *See* Hernaez Decl. at ¶ 9 & Ex. H (E002889, #2). Indeed, although Ennix did not submit this report to the MEC and refused to turn over the report in discovery without Court intervention, Dr. Hill's underlying findings are clear:

> The three main issues in this case are delay in investigating the carotid arteries, patient management till the surgery, and management of the patient immediately before and at the time of surgery.

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> * * * *
>
> Later the events just before surgery and the operation were mismanaged. The patient should not have been allowed to be at risk with ischemic myocardial chest pain in the preop area.
>
> * * * *
>
> The entire set of events and process that occurred from the time the patient came into the pre op area till the patient went into cardiogenic shock and was emergently placed on cardiopulmonary bypass is below the standard of care for this clinical situation and the surgeon must bear most of the responsibility.

See Hernaez Decl. at ¶ 9 & Ex. H (E002898).

Next, in addition to the various negative findings announced by Ennix's two medical experts, is the opinion of Dr. Hon S. Lee, a cardiac surgeon used by the Summit Medical Staff to review the four problematic MIV surgeries. Ennix himself regards Lee as "among the top practitioners of the [MIV] procedure in the Bay Area." *See* Ennix Decl. (filed July 12, 2007) at ¶ 3:8-10. However, Dr. Lee was critical of Ennix.

To begin with, Dr. Lee agreed that the Medical Staff's concern with the extended length of Ennix's MIV procedures was valid. Lee Tr. at 23:17-25 (attached to the Hernaez Decl. as Exhibit I). The reason is simple: "the longer the operating time, the more risk to a patient in open heart surgery situation." Lee Tr. at 26:10-13. Dr. Lee also agreed that suspending the MIV procedures after Ennix's first four failures was "a reasonable response" and that the "outcomes of these four procedures were alarming." Lee Tr. at 24:5-15. He also specifically faulted Ennix's failure to obtain the proper patient consents. Lee Tr. at 25:10-13.

Dr. Lee further agreed that a reasonable person reviewing his report "might legitimately determine that there was a need for further review." Lee Tr. at 40:14-21.

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Hence Dr. Lee did not find the Medical Staff's action in continuing its peer review process unfair to Dr. Ennix. Lee Tr. at 38:24-39:1. Lastly, in his interaction with the Medical Staff, Dr. Lee admits that he heard nothing whatsoever suggesting any type of racial bias. To the contrary, he observed that the peer review personnel were "acting in good faith with a point of view of ensuring patient safety." Lee Tr. at 67:25-68:21.

In addition to Ennix's own retained experts and one of the "top practitioners of the [MIV] procedure in the Bay Area," the Medical Board of California also took issue with Ennix's surgical performance. In particular, the Medical Board, after conducting an investigation, interviewing Ennix, and hiring an outside expert, concluded that Ennix committed "negligence" (described as a "simple departure in the standard of practice")[10] in three out of the ten procedures they reviewed. *See* Ennix Tr. at 31:8-32:9 & Ex. 4. These findings by the Medical Board, which included negligence findings in 2 of the 4 MIV procedures, only underscored the propriety of NMA's conclusions. Ennix has no "specific facts" suggesting race discrimination and ABSMC has strong evidence—from the NMA report, from the findings of its committees, from Ennix's own experts, from Dr. Lee, and from the State of California—that corrective action was appropriate and necessary.

D. ABSMC Is Entitled To An Award Of Attorneys' Fees.

Pursuant to 42 U.S.C. § 1988, a party prevailing in a cause of action arising under, *inter alia*, § 1981 may be awarded reasonable attorneys' fees. *See Staton v. Boeing Co.*, 327 F.3d 938, 966 (9th Cir. 2003). ABSMC respectfully requests that fees be awarded in this case.

[10] The Medical Board's definition of "negligence" is stated on its website. ABSMC asks that this Court take judicial notice of the definition. See Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). http://www.mbc.ca.gov/publications/medical_consultant_english-print.pdf. Websites may be judicially noticed. *See Garza v. Adams*, 2008 U.S. Dist. LEXIS 9841 *4 - *5 (E. D. Cal. 2008).

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IV. CONCLUSION

> Summary judgment is not a "peculiar procedural shortcut," but an integral part of the framework of the Rules, closely related to other provisions which are similarly intended to permit the early elimination of claims and defenses that the proponent cannot support. Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive.

Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986).

This case demonstrates the wisdom of Rule 56. Ennix has been on staff at Alta Bates or Summit Medical Center (or their predecessors) for nearly thirty years. All of a sudden Ennix now believes that the peer review process is racist. That conclusion simply defies logic. And more importantly, that conclusion is without even scintilla evidence. Because there is no contract between the parties, and because there is no race based evidence of discrimination, the Court should grant ABSMC summary judgment.

DATED: February 26, 2008

Respectfully submitted,

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